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In The

Supreme Court of the United States

GEORGE SEFERI ET AL,

Appellants

vs.

HOWARD S. IVES, STATE HIGHWAY COMMISSIONER.

Appellee

On Appeal from The Supreme Court of the State of Connecticut

JURISDICTIONAL STATEMENT.

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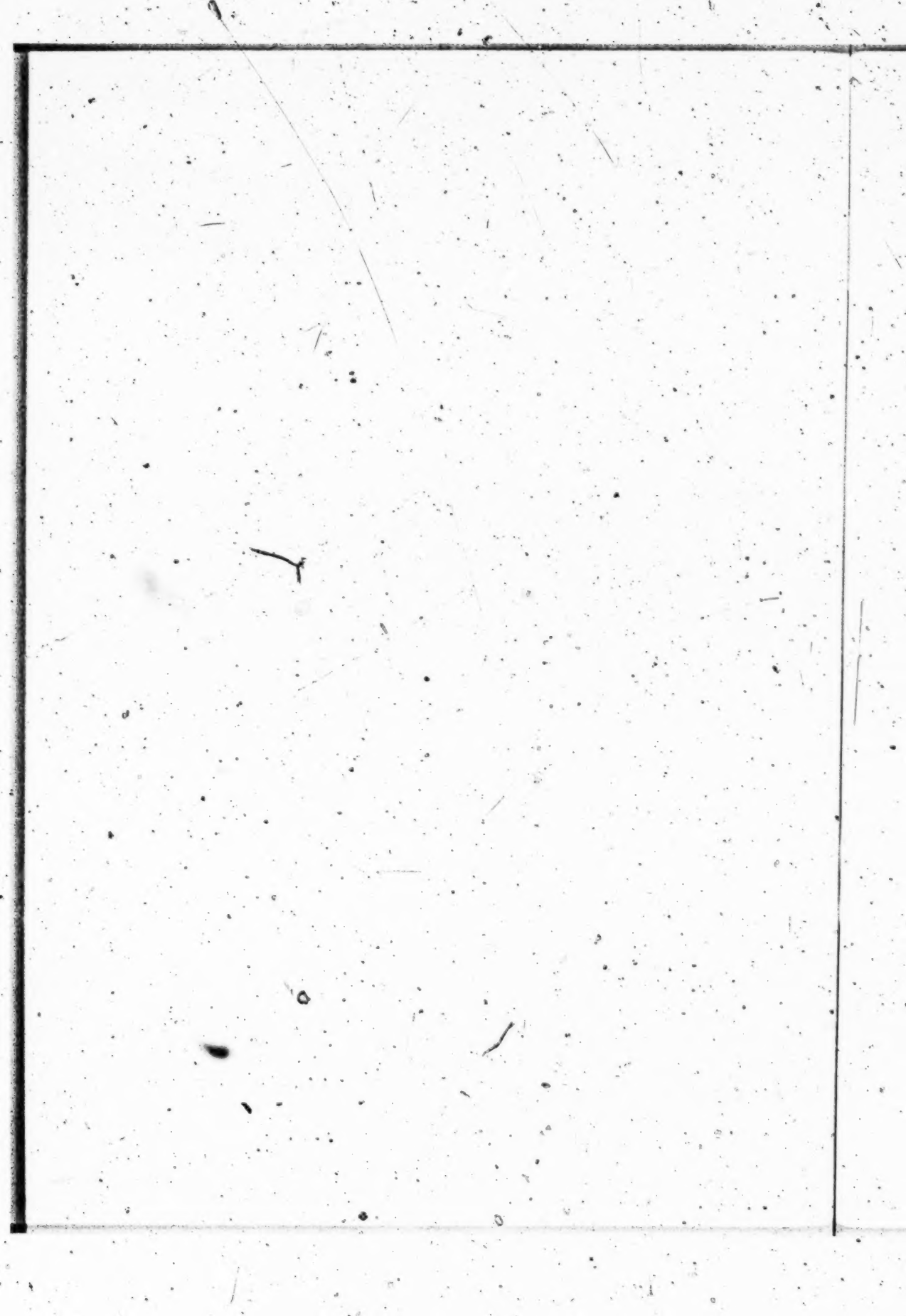

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HOWARD S. IVES, STATE HIGHWAY COMMISSIONER.

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On Appeal from The Supreme Court of the State of Connecticut

JURISDICTIONAL STATEMENT.

I.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the Superior Court for Fairfield County entered on January 19, 1968 in accordance with the decree of the Supreme Court of the State of Connecticut entered on November 21, 1967, setting aside a judgment of the Superior Court for Fairfield County and ordering final judgment that the damages to which the appellants are entitled are $139,000, not $188,000, and on which the appellants motion for permission to reargue the case was denied by the Supreme Court of the State of Connecticut on December 19, 1967. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

II.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Connecticut is reported in 155 Conn., — 236 A.2d 83 (1967). A copy of the opinion is attached hereto as Appendix A. The opinion of the Superior Court for Fairfield County from which the appellee herein appealed to the Supreme Court of Connecticut, is not reported, but a copy thereof is set forth in Appendix B.

III.

JURISDICTION.

Section 13a-73b, Connecticut General Statutes, authorizes the highway commissioner of the State of Connecticut to take any land he finds necessary for the layout or improvement of any state highway, and it provides that the owner of such land shall be paid by the state for all damages resulting from the taking. An assessment of damages is made by the highway commissioner, and it is filed by him with the clerk of the superior court in the county in which the land is located. Section 13a-76 set out in appendix G, permits any person aggrieved by the assessment of damages by the highway commissioner for the taking to apply to the superior court for the county in which such land is situated for a reassessment of the damages.

Such an application was made by the appellants in this proceeding.

The judgment of the Supreme Court of the State of Connecticut was entered on November 21, 1967 and announced on December 5, 1967. Appellants' Motion to Reargue was filed on December 11, 1967 and the final decree of the Supreme Court of the State of Connecticut denying appellants' Motion to Reargue was entered on December 19, 1967. Final judgment in accordance with the opinion of the Supreme Court of the State of Connecticut was entered by the Superior Court for Fairfield County on January 19, 1968.

Notice of Appeal was filed in the Supreme Court

of the State of Connecticut on February 28, 1968 with proof of service on all parties.

The jurisdiction of the Supreme Court of the United States to review this judgment on direct appeal is conferred by Title 28, United States Code, Section 1257(2). **Robinson v. California,** 370 U.S. 660, 664 (1962). If the second question presented were the sole question sought to be reviewed, it would properly be the subject of a petition for certiorari, conferred by Title 28, United States Code, Section 1257(3). Under the circumstances of this case, jurisdiction to review the latter question on direct appeal is sustained by **Flourney v. Winer,** 321 U. S. 253, 263 (1944).

IV.

QUESTIONS PRESENTED.

1. Whether or not Section 13a-73b of the Connecticut General Statutes, authorizing the highway commissioner to take any land he may find necessary for the layout of any trunkline highway, and to pay the owner all damages, violates the Fifth and Fourteenth Amendments to the Constitution of the United States when it is construed by the Supreme Court of the State of Connecticut to preclude an award of damages for the value of an immovable business destroyed as a result of the condemnation?

2. Whether or not the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to award damages to the appellants for the value of their business de-

stroyed as a result of the exercise by the state of its power of eminent domain?

V.

STATUTES INVOLVED.

1. The statute involved is Section 13a-73b of the Connecticut General Statutes and it is set out in Appendix F.

2. The provisions of the Constitution of the United States relied upon are portions of the Fifth and Fourteenth Amendments set out in Appendix H.

VI.

STATEMENT.

A. FACTS:

On August 20, 1965, pursuant to the provisions of Section 13a-73b of the Connecticut General Statutes, Howard S. Ives, Highway Commissioner of the State of Connecticut, took the property owned by George, Nicola, and Peter Seferi, together with all buildings and appurtenances, known as 599 Lafayette Street, Bridgeport, for the relocation of Route 25, Bridgeport-Newtown Road, and assessed damages in the sum of $83,600. Pursuant to Section 13a-76 of the General Statutes, the appellants appealed from the assessment.

Hon. Samuel Mellitz, State Referee, to whom the appeal was referred, filed his report on August 30,

1966. The following undisputed facts were found by the referee (Record, pp. 4-5):

1. At the time of the taking the plaintiffs conducted a retail supermarket business in the building on the property.

2. The gross annual receipts from this business were $430,000, the annual net profit was approximately $40,000, and the value of the business was $42,500.

3. Although moving costs, if this business could be moved, would be $10,171, there was no location or site anywhere in the area which the plaintiffs could acquire and to which they could move their business, including fixtures and equipment.

4. Because the plaintiffs could not move their business they lost $16,344 worth of movable fixtures.

The referee found in the alternative. He assessed damages at $139,000, taking into account moving costs of $10,171; in the alternative he assessed damages at $188,000 if the appellants were entitled to be compensated for the value of the business and fixtures lost in addition to the value of the land and buildings.

The Superior Court for Fairfield County accepted the report of the referee and in an opinion filed on December 8, 1966, set out in Appendix B, assessed damages to the appellants in the sum of $188,000. The highway commissioner appealed this decision to the Supreme Court of the State of Connecticut. In

the opinion set out in Appendix A, the Supreme Court set aside the judgment of the Superior Court, it remanded the case, and it directed that the damages be assessed at $139,000. Thereafter the appellants filed with the Supreme Court, their Motion to Reargue, Appendix C, limited to their constitutional claims. On December 19, 1967, the Supreme Court denied this Motion to Reargue. Final judgment was entered in the Superior Court for Fairfield County on January 19, 1968, from which this appeal is taken.

B. PRESENTATION OF THE FEDERAL QUESTIONS:

The application of the appellants in the Superior Court, filed in accordance with Section 13a-76 followed the language of the statutes and it recited that the appellants were aggrieved by the assessment of damages by the highway commissioner in the sum of $83,600.

The federal question was first raised before the Hon. Samuel Mellitz, State Referee, to whom the issue was referred by the Superior Court. The fedral claim was made orally, and in support of the contention of the appellants that they were entitled to recovery for the value of their business and fixtures. As a result of the assertion that a failure to make an allowance in the assessment of damages for these items would violate the Fifth and Fourteenth Amendments to the Constitution of the United States, the referee included them in the alternative. Record, pp. 4-6.

Motions for acceptance of the report of the state

referee were filed by both parties, Record, pp. 6-7, and at the hearing conducted by the Hon. Anthony J. Armentano, Judge of the Superior Court, the federal questions were again raised. Judge Armentano recognized the claim of the appellants in his Memorandum of Decision awarding damages in the larger amount, $188,000. Record, pp. 7-8.

The appellants pursued their federal claims in the Supreme Court of Connecticut in their brief and in oral argument, as follows (Brief, p. 14):

> "Finally, under any theory for payment of just compensation to the plaintiffs, by virtue of the provisions of Article First, Section 11 of the Connecticut Constitution and the Fifth Amendment to the United States Constitution, the plaintiffs must be paid for all of their property taken from them by the State of Connecticut."

The Motion to Reargue the decision of the Supreme Court, Appendix C, was specifically addressed to the federal issues as follows:

> "The appellees in the above-entitled action respectfully move this court for permission to reargue, limited to the question presented in the record as to whether or not Section 13a-73b of the General Statutes, as applied, violates the Fifth and Fourteenth Amendments to the United States Constitution.
>
> "In awarding damages to the appellees, the trial court relied upon the Fifth and Fourteenth Amendments to the United States Constitution. The appellees claimed in their brief to this Court that the Fifth Amendment to the United States

Constitution required that they be compensated for all of the loss occasioned by the Highway Commissioner's taking of their property. The validity of Section 13a-73b as applied in prior decisions of this court was drawn into question. The appellees respectfully represent that implicit in the decision of the court in the instant case is the construction of Section 13a-73b of the General Statutes which is contrary to that which the trial court and the appellees have asserted is required by the Fifth and Fourteenth Amendments to the United States Constitution.

"Since the decision of this court announced December 5, 1967, did not discuss the effect of the United States Constitution upon Section 13a-73b of the General Statutes nor indicate that this aspect of the appellees' argument had been considered, the appellees respectfully request an opportunity to reargue before this court in order that the decision in the above-entitled action might be reconsidered in light of the mandates of the Fifth and Fourteenth Amendments to the United States Constitution."

VII.

THE QUESTIONS ARE SUBSTANTIAL.

Section 13a-73b of the Connecticut General Statutes is the state's only legislation enabling highway condemnation and requiring the payment of all damages to the owner of the condemned land. As construed and applied by the Connecticut Supreme Court, the statute precludes an award of damages

for the loss of a business. It is the contention of the appellants that the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to pay to the owner the value of a business destroyed as a result of a condemnation.

Decided cases are generally opposed to the contentions of the appellants. Decisions of this court and lesser tribunals reiterate the general rule. The loss of a business is considered "consequential" damage and, therefore, courts have not required the condemnor to compensate the owner for his loss. **United States v. General Motors Corp.**, 323 U. S. 373 (1945).

The reasons purporting to support the general rule denying compensation for the loss of a business, sometimes termed "good-will", are as follows:

a. Neither the business nor the good-will are taken pursuant to a condemnation of land.

b. Damage to a business is **damnum absque injuria.**

c. A business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution protects.

d. The loss of a business was not within the contemplation of the eminent domain clause of the constitution. 4 Nichols, **Eminent Domain** § 13.3, pp. 444-42 (3rd. ed. 1962).

The appellants contend that this rule is archaic, illogical, and unjust; that the reasons for the rule, if ever valid, no longer obtain; and that modern con-

cepts of the term "property" dictate a more equitable interpretation of constitutional provisions "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." **Armstrong v. United States,** 364 U.S. 40, 49 (1960). They maintain that it is not constitutionally permissible for a governmental unit to destroy private property without paying just compensation to the owner thereof.

A person's business is a property right. **Truax v. Corrigan,** 257 U.S. 312, 327 (1921); **Duplex Printing Press Co. v. Deering,** 254 U.S. 443, 465 (1921). The Constitution makes no distinction between real and personal property taken for public use. **Heflebower v. United States,** 21 Ct. Cl. 228 (1886). An owner whose property is destroyed is entitled to compensation as to both real and personal property because in either case there is a "taking" for which the Fifth Amendment requires just compensation. **Causby v. United States,** 75 F. Supp. 262, 109 Ct. Cl. 768 (1948). The Amendment's protection is not altered by the fact that the property taken is intangible. **Kimball Laundry Co. v. United States,** 338 U.S. 1 (1948). The requirement in the Fifth Amendment of just compensation for the taking of private property for public use applies to the states, and it is incorporated into the meaning of "due process" required by the Fourteenth Amendment. **Foster v. City of Detroit, Michigan,** 254 F. Supp. 655 (D.C. Mich. 1966).

In view of the obvious growth of government on all levels, the extension of governmental activities into spheres formerly reserved for private enterprise, the increase in government spending in the

customary areas of national defense, highway construction, urban renewal, and, more recently, the growing number of states adopting open space programs to conserve land for public parks, it is clear that the importance of awarding "just compensation" in condemnation cases shall become vitally important to a broader segment of the public. See Report of Committee on Public Works, 88th Cong., 2d Sess., **Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs,** (Committee Print No. 31, 1964) indicating the overwhelming extent of the acquisition for federal and federally assisted state and local programs.

Text writers and scholars have long noted the inequities and injustices brought about by incidental or *consequential losses resulting from condemnation* proceedings.[1] The Harvard Student Legislative Research Bureau has proposed model legislation entitled "An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings," 3 **Harvard Journal on Legislation** 445 (1966).

Legislatures, too, have recognized the inequity facing some property owners as the result of condemnations. A gradual liberalizing of the harsh rules characterizing the common law of eminent domain

[1]See Slavitt, "Inequities and Injustices of Condemnation Acquisitions," 40 **Conn. B. J.** 11 (1966) and authorities cited in note 1 therein; Helstad, "Recent Trends in Highway Condemnation Law," **Wash. U. L. Q.** p. 58 (Feb. 1964); Spies & McCoid, II, "Recovery of Consequential Damages in Eminent Domain," 48 **Va. L. Rev.** 437 (1962); Note, "Compensation for Public Use — Congressional Action and the Fifth Amendment," 32 **Tenn. L. Rev.** 615 (1965).

is evidenced by the legislative changes which have occurred.[2]

It is clear that the question of "just compensation" in condemnation proceedings has been the subject of widespread consideration by both legislators and scholars.

Finally, the apt words of this court in **Olson v. United States,** 292 U.S. 246 (1934) well summarize and support the appellants' contention that the questions presented herein are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution.

> "The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in **Monogahela Navigation v. United States,** 148 U. S. 312, 324: 'In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.

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[2]See statutes cited in Slavitt, **supra** at notes 28 and 29; 26 **Penn. Stat. Ann.** §§ 1-601 through 1-614 (Purdon, 1964); **Conn. Pub. Acts** (1967) Nos. 108 and 598.

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 299." **Id.** at 254-255.

VIII.

CONCLUSION.

The questions presented by the appellants are substantial. As a direct consequence of the taking of their real property, the State of Connecticut took from the Seferi brothers another most valuable property, their supermarket business and its fixtures. It is true that the State of Connecticut did not thereafter conduct the business or physically use the equipment, but the appellants were deprived of their personal property by the action of the state.

The Supreme Court of the State of Connecticut refused to agree that the State of Connecticut should be required to pay for those properties. We submit that the Constitution of the United States protects the Seferi brothers under these circumstances and that the taking violated their rights. We believe also that the Supreme Court of Connecticut should have interpreted Section 13a-73b to include the value of the Seferi business and its fixtures as damages for which the Seferi brothers were entitled to be paid just compensation.

Respectfully Submitted,

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